Supreme Court, U.S.
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No. 99-372

IN THE

Supreme Court of the United States

DR. CARL BERNOFSKY,

Petitioner,

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND (TULANE UNIVERSITY SCHOOL OF MEDICINE),

Respondent.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

G. PHILLIP SHULER, III
Counsel of Record
JULIE D. LIVAUDAIS
RICHARD B. RAMIREZ
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.
Attorneys for Respondent
1100 Poydras Street
2300 Energy Centre
New Orleans, LA 70163-2300
(504) 585-7000

155298

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED FOR REVIEW

Respondent, The Administrators of the Tulane Educational Fund, disagrees with the statement of the question presented by Petitioner because it is based on erroneous representations of fact. The question presented for consideration is:

1. Should a United States District Court Judge, who occasionally taught as a substitute teacher for a Tulane University adjunct faculty member, and who is a former member of the board of directors of an independent research center located on Tulane University's campus, be disqualified from presiding in a case in which Tulane University is a party?

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Respondent, The Administrators of the Tulane Educational Fund ("Tulane") submits that there is no basis for granting a writ of mandamus in this case. The United States Court of Appeals for the Fifth Circuit correctly determined that recusal was not mandated by United States District Judge Ginger Berrigan's tenuous affiliations to Tulane in this case. Petitioner has presented no exceptional circumstances warranting the exercise of this Court's discretionary powers and has not shown that the writ will aid in the Court's appellate jurisdiction.

STATEMENT OF THE CASE

A. Procedural Background

Before this Honorable Court is the latest salvo in Petitioner Carl Bernofsky's parade of lawsuits against his former employer, Tulane University. The litigation all stems from the termination of his employment as a (non-tenured) research professor in the Department of Biochemistry at Tulane Medical School; his complaints have included discrimination, retaliation, defamation, and ERISA violations. The subject of the instant Writ is Bernofsky's perception that the federal district judge who has presided over his many cases is biased against him and should have recused herself from the proceedings.

Bernofsky's first suit was filed against Tulane in the United States District Court for the Eastern District of Louisiana in 1995, alleging discrimination under 42 U.S.C. § 1981 and the ADEA as well as various state law claims. After Tulane demonstrated a legitimate reason for Bernofsky's dismissal from the Tulane faculty and Bernofsky was unable to prove that the profferred reason was in any

way pretextual, Judge Ginger Berrigan granted Tulane's Motion for Summary Judgment and dismissed Bernofsky's suit on April 21, 1997. *Bernofsky v. Tulane Univ. Med. School*, 962 F. Supp. 895 (E.D. La. 1997). The Fifth Circuit affirmed the district court's ruling and denied Bernofsky's Petition for Rehearing. *Bernofsky v. Tulane Univ. Med. Center*, 136 F.2d 137 (5th Cir. 1998). This Honorable Court denied Bernofsky's petition for writ of certiorari to review the dismissal of his case. *Bernofsky v. Tulane Univ. Med. School*, __ U.S. __, 119 S. Ct. 48, 142 L. Ed. 2d 37 (Oct. 5, 1998).

Bernofsky then filed two more lawsuits against Tulane in Louisiana state court, which were removed, and one more federal suit, all of which were assigned to Judge Berrigan.[1] On October 15, 1998, Bernofsky first filed a motion to recuse Judge Berrigan, arguing that Judge Berrigan's past service as an unpaid substitute professor of law at Tulane and her brief peripheral association with an independent nonprofit corporation, the Amistad Research Center, located on Tulane's campus, warranted disqualification under 28 U.S.C. § 455(a). Tulane opposed Bernofsky's motion to recuse and on November 23, 1998, the district court denied his motion. *Bernofsky v. Tulane*, Civil Action No. 98-1792, Docket No. 24 (E.D. La. Nov. 23, 1998). Bernofsky's improper attempt to appeal the district court's interlocutory ruling was dismissed by the Fifth Circuit. *Bernofsky v. The Administrators of the Tulane Educational Fund*, Case No. 98-31417 (5th Cir. Feb. 2, 1999).

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1. Under Local Civil Rules 3.1 and 3.1.1E of the Uniform Local Rules of the United States District Courts for the Eastern, Middle, and Western Districts of Louisiana, Judge Berrigan retained jurisdiction of these collateral proceedings.

Undeterred, and clearly unsatisfied with his inability to have Judge Berrigan disqualified, Bernofsky filed a Complaint of Judicial Misconduct with the Fifth Circuit against Judge Berrigan. After his Complaint of Judicial Misconduct was rejected and his "appeal" denied, *In re: The Complaint of Dr. Carl Bernofsky*, Docket No. 99-05-372-0118 (5th Cir. March 1, 1999), Bernofsky filed a Petition for Writ of Mandamus. The Fifth Circuit correctly denied Bernofsky's Petition for Writ of Mandamus on July 6, 1999. *In re: Carl Bernofsky*, Docket No. 99-30614 (5th Cir. July 6, 1999). This Petition for Writ of Mandamus followed.

B. The Relevant Facts

1. The Amistad Research Center

One of the bases for Bernofsky's repeated attempts to recuse Judge Berrigan is the fact that she was a member of the Board of Directors of the Amistad Research Center from 1990-1994. But Judge Berrigan's membership on the Board of Directors ended in 1994, before Bernofsky filed his first suit against Tulane in 1995. Moreover, the relationship of the Amistad Research Center to Tulane is too tenuous to support Bernofsky's allegations of an improper affiliation between Tulane and the Judge.

The Amistad Research Center is a non-profit corporation and a completely separate entity from Tulane. Tulane neither controls nor owns the Center, and does not pay the salaries of its employees. Tulane provides space for the Center on its Uptown campus. There, the Center makes available to the general public materials of historic significance pertaining to the history and culture of ethnic minorities in the United States. The Center is administered by a Board of

Directors, only two of whom are appointed by Tulane. Tulane's appointees are drawn from its own faculty and staff. Tulane has never appointed Judge Berrigan or any other judge to the Center's Board of Directors.

2. Judge Berrigan's Teaching Relationship to Tulane

Judge Berrigan's only teaching undertaking at Tulane involved substitute teaching several classes for her colleague, Judge Charles Schwartz, Jr. at Tulane University School of Law, for which she received no compensation. See Petitioner's Exhibit A-1. Judge Berrigan is not an adjunct faculty member at Tulane University.

REASONS FOR DENYING THE WRIT

I.

JUDGE BERRIGAN'S TEACHING AND DIRECTORSHIP ACTIVITIES INVOLVE ONLY A PERIPHERAL ASSOCIATION TO TULANE AND DO NOT JUSTIFY RECUSAL

Petitioner has requested that a Writ of Mandamus issue compelling Judge Berrigan to disqualify herself from these proceedings. Bernofsky asserts two bases for the issuance of this writ, each more far-fetched than the other. First, Bernofsky argues that the district judge's occasional participation as a non-paid substitute instructor in a Tulane trial advocacy course raises the specter of bias and thus warrants disqualification under 28 U.S.C. § 455(a). Second, Bernfosky theorizes that Judge Berrigan's prior service on the board of an independent non-profit research center which is located on Tulane's campus somehow implicates 28 U.S.C.

§ 455(b)(5)(i). Finally, Bernofsky reveals his true motive for asserting these groundless recusal arguments when he asks this Honorable Court to vacate the district court's 1997 dismissal of his Title VII lawsuit against Tulane.

Petitioner's invocation of § 455 is a thinly-veiled procedural attempt at breathing new life into claims which were found substantively deficient by the district court, by the Fifth Circuit Court of Appeals (twice), and by this Honorable Court. Bernofsky must not be permitted to embellish facts and distort the record and thus obtain a fifth bite at the same rotten apple.

A. Petitioner Is Not Entitled To The Extraordinary Remedy Of Mandamus

It is well settled that a writ of mandamus "is an extraordinary remedy reserved for extraordinary situations" and "is not to be used as a substitute for appeal." *In re: Terra Intern., Inc.*, 134 F.3d 302, 305 (5th Cir. 1998), *quoting In re: American Marine Holding Co.*, 14 F.3d 276, 277 (5th Cir. 1994); *Kerr v. United States District Court*, 426 U.S. 394, 965 S. Ct. 2119, 48 L. Ed. 2d 725 (1976). Generally, mandamus is appropriate "when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court." *In re: Terra Intern., Inc., supra,* citing *In re: Dresser Industries Inc.*, 972 F.2d 540, 543 (5th Cir. 1992) *quoting In re: Chesson*, 897 F.2d 156, 159 (5th Cir. 1990). More specifically, and with respect to the present matter, while a petition for writ of mandamus may be the appropriate procedural device for challenging the denial of a disqualification motion, the relief sought should be granted

only in exceptional circumstances. *In re: Chevron USA, Inc.*, 121 F.3d 163, 165 (5th Cir. 1997), *citing In re: City of Houston*, 745 F.2d 925, 927 (5th Cir. 1984).

When Bernofsky's stated reasons for seeking Judge Berrigan's recusal are scrutinized under § 455, the conclusion is inescapable that his petition for a writ of mandamus must be denied. The district court's impartiality cannot reasonably be called into question based solely upon Judge Berrigan's peripheral association with a nonprofit corporation located on Tulane's uptown campus and her occasional teaching engagements at Tulane. Bernofsky's contrived conspiracy theories simply do not warrant application of the extraordinary remedy of mandamus.

B. Petitioner Has Not Carried His Burden Under § 455

A party seeking to disqualify a judge "must show that, if a **reasonable man** knew of all the circumstances, he would harbor doubts about the judge's impartiality." *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1405, 1408 (5th Cir. 1994), *citing Matter of Billedeaux*, 972 F.2d 104, 105 (5th Cir. 1992), *quoting Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982) (citations omitted), *cert. denied*, 464 U.S. 814, 104 S. Ct. 69, 78 L. Ed. 2d 83 (1983). The standard to be applied is an objective one:

> The question that the governing statute requires me to answer is whether — taking as one's instrument of observation and assessment not *my* perspective but the perspective of an objective external observer who is not acquainted with me

> but is acquainted with the record facts recited above — my "impartiality might reasonably be questioned."

United States v. Muskovits, 866 F. Supp. 178, 181 (E.D. Pa. 1994) (emphasis in original; citations omitted). Bernofsky cannot establish that a reasonable person would conclude that the remote connection between Judge Berrigan and Tulane creates an appearance of impropriety.

There are, of course, many cases in which petitioners have challenged through mandamus a district court's denial of a motion to disqualify, and some have been successful. In *Tramonte v. Chrysler Corporation*, 136 F.3d 1025 (5th Cir. 1998), for example, the Fifth Circuit reversed and remanded for further discovery the district court's denial of a motion to recuse when the record was insufficient to determine whether the district judge's family member might qualify as a member of a class action lawsuit. In *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155 (3rd Cir. 1993), a petition for writ of mandamus was granted disqualifying a district judge under § 455 when the record established a history of often bitter disputes between the court and counsel for the petitioners. And, in *Nichols v. Alley*, 71 F.3d 347 (10th Cir. 1995), a petitioner's writ of mandamus was granted compelling disqualification of the district court judge whose chambers were severely damaged when a bomb planted by Nichols exploded. In each of these cases, the respective appellate courts have been presented with issues both compelling and very real: a family member falling within a class of litigants, a clear history of open dispute with counsel, the natural response of one to catastrophe on a massive scale. Whether bias was actually present or simply could not be objectively discounted, the connection was too close and recusal was required.

No such circumstances are present herein. Conjuring up alliances between Tulane and any state or federal judge even peripherally associated with the school, Bernofsky hopes to create the illusion of bias under § 455(a) where clearly none exists. Finding deceit and complicity in the innocuous, Bernofsky has seized upon Judge Berrigan's charitable involvement with a non-profit research group and fashioned this into a § 455(b)(5)(i) violation.

1. There is no basis for disqualification under § 455(a)

Judge Berrigan's prior, now ended, service to the law school as an unpaid substitute instructor clearly does not satisfy § 455(a). For example, in *Tonkovich v. Kansas Bd. Of Regents*, 924 F. Supp. 1084, 1086-88 (D. Kan. 1996), the district court found that:

> The fact that [the Magistrate Judge] may have given service to the law school as an adjunct instructor does not give rise to a reason for his recusal, nor for mine. . . . Counsel for plaintiff . . . leaps from one tenuous connection to another to suggest that this judge could somehow be perceived to be a part of an intrigue against the plaintiff. The suggestion is rejected.

Like Tonkovich, Bernofsky here "leaps from one tenuous connection to another" in attempting to establish a § 455(a) disqualifying circumstance. As in *Tonkovich*, Petitioner's fanciful suggestion must be rejected.

A similar attempt at disqualification was made under similar facts in *Levitt v. University of Texas at El Paso*, 847 F.2d 221 (5th Cir. 1988), *cert. denied*, 488 U.S. 984, 109

S. Ct. 536, 102 L. Ed. 2d 567 (1988). In *Levitt*, a former tenured chemistry professor was terminated from his position for misconduct and filed suit against the university alleging that he was fired because he was Jewish. The district court granted judgment in favor of the university after a trial on the merits (Levitt I), and subsequently dismissed a second lawsuit on grounds of *res judicata* and collateral estoppel (Levitt II). Levitt appealed arguing, among other things, that the district judge should have recused himself in Levitt II because his wife was a student at the university and because the judge obtained his B.A. and J.D. degrees from the university. *Levitt, supra*, at 224-226. The Fifth Circuit found no merit in Levitt's tenuous disqualification claims, and found instead that district judge's association with the university simply did not trigger § 455(a). *Id.* at 226. In the instant case, Judge Berrigan is not an alumna of Tulane (University of Wisconsin, B.A.; Louisiana State University, J.D.), nor has Petitioner alleged any demonstrable acts of favoritism by Judge Berrigan to Tulane apart from her occasional substitute teaching. Clearly, Judge Berrigan's associations, such as they are, with Tulane are fewer in number and lesser in degree than those found not to be violative of § 455 in *Levitt*.

Similarly, in *Wu v. Thomas et al.*, 996 F.2d 271 (11th Cir. 1993), *cert. denied*, 511 U.S. 1033, 114 S. Ct. 1543, 128 L. Ed. 2d 195 (1994), a university professor alleged that she was being subjected to unlawful retaliation by the University of Alabama and a number of supervisors for having previously asserted an unsuccessful sex discrimination lawsuit. The first lawsuit (Wu I) was tried on the merits to the district judge who found for the university, and the second lawsuit (Wu II) was filed three years later. *Id.* at 272. Following a largely unsuccessful trial on the merits

of Wu II, the plaintiff appealed and argued, *inter alia*, that the district judge should have recused himself under 28 U.S.C. § 455(a) because of alleged "ties" to the university. *Id.* at 274-75.

Wu alleged that disqualification was required under § 455(a) because the district judge was an adjunct professor at the university and had given contributions to it in the past. In denying Wu's recusal motion, the district judge noted that he received no salary as an adjunct professor and that his duties were limited to participating in a judicial internship program. *Id.* at 275. In affirming the district judge's refusal to disqualify himself, the Fifth Circuit concluded that "[o]n these facts (which are uncontested), no reasonable observer would assume that [the district judge] had extra-judicial knowledge of this case or otherwise question [his] impartiality." *Id.* As in *Wu*, no reasonable observer could assume that Judge Berrigan's limited role as an uncompensated substitute instructor at Tulane's Law School could raise the specter of impartiality. Thus, as in *Wu*, disqualification under § 455(a) is inappropriate.

Like the plaintiff in *Wu*, Bernofsky attempts to bootstrap a theory of bias based upon unfavorable rulings by the district judge in previous litigation. However, to the extent that Bernofsky's Motion for Recusal is based upon judicial, as opposed to extra-judicial, conduct, his complaint finds no support under § 455. That an adverse ruling should not serve as a basis for disqualification is based upon the "practical purpose of preventing parties from using the claim of partiality as a pretext for judge-shopping . . .". *In Re Jewelcor, Inc.*, 166 Br. 41, 44 (Bkrtcy. M.D. Pa. 1994), *quoting United States v. Conforte*, 457 F. Supp. 641, 657 (D.C. Nev. 1978), *aff'd in pertinent part*, 624 F.2d 869 (9th

Cir. 1980), *cert. denied*, 449 U.S. 1012, 101 S. Ct. 568, 66 L. Ed. 2d 470 (1980). It is well settled that complaints of prior adverse rulings are insufficient grounds for disqualification. *See Hepperle v. Johnston*, 590 F.2d 609, 614 (5th Cir. 1979), *citing United States v. Partin*, 552 F.2d 621, 637 (5th Cir. 1977), *cert. denied*, 434 U.S. 903, 98 S. Ct. 298, 54 L. Ed. 2d 189 (1977). Moreover, even if Judge Berrigan's ruling granting summary judgment could be considered, that ruling was correct and was not motivated in any way by bias, as shown by the Fifth Circuit's affirmation of that ruling and this Court's denial of Bernofsky's petition for a writ of certiorari to review that ruling. Petitioner must not be allowed to effectively "opt-out" of Judge Berrigan's section of court simply because he disagrees with previous rulings. Bernofsky's scheme to disqualify Judge Berrigan is improper "judge-shopping," and must be rejected.

Bernofsky further attempts to show bias by arguing at page 19 of his writ that the very fact that he filed a motion seeking Judge Berrigan's recusal must have prejudiced the court against him. But if this were true, the mere filing of an unfounded recusal motion could be used as a means of replacing a judge one finds unfavorable. Clearly, this result cannot be countenanced.

The present facts are far different from those presented for review to this Honorable Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988). In *Liljeberg*, the district judge was found to have been an active board member of Loyola University, a party in interest with respect to on-going litigation assigned to the district judge. Because Loyola stood to realize a significant financial gain as a result of the impending sale of land made the basis of the on-going

litigation, and because the district judge personally participated in board meeting during which the subject matter of the litigation was discussed, the Fifth Circuit found that the district judge erred in refusing to recuse himself under § 455(a). *Id.* at 486 U.S. 852.

The differences between *Liljeberg* and this case are many and clear. First, unlike the district judge in *Liljeberg*, Judge Berrigan is not a member of the board of directors of Tulane University. Judge Berrigan was a member of the board of directors of the Amistad Research Center, a non-profit independent research center located on Tulane's campus; she is not a member of Tulane's board of directors. Of course, the Amistad Research Center is not a party to the present litigation, and has absolutely no connection to Bernofsky's claims whatsoever. Furthermore, while the district judge in *Liljeberg* was found to have personally participated in university board meetings during which the on-going litigation was discussed, Bernofsky has not even attempted to establish that Judge Berrigan's tenuous association with Tulane as either a substitute professor or a former board member of an unrelated non-profit organization is even remotely associated with the litigation herein. While recusal under § 455(a) may have been appropriate under the circumstances present in *Liljeberg*, the facts in this case are far different and require a different result.

2. There is no basis for disqualification under § 455(b)(5)(i)

Equally tenuous is Judge Berrigan's connection to Tulane through the Amistad Research Center, a non-profit corporation and a completely separate entity from Tulane. As previously noted, Tulane neither controls nor owns the

Center, and does not pay the salaries of its employees. Tulane provides space for the Center on its Uptown campus where the Center makes available to the general public materials of historic significance concerning the history and culture of ethnic minorities in the United States. The Center is administered by a Board of Directors, only two of whom are appointed by Tulane. Tulane's appointees are drawn from its own faculty and staff. Tulane has never appointed Judge Berrigan to the Center's Board of Directors.

An insubstantial connection to a university does not give rise to the requirement of recusal. *See*, for example, *Lunde v. Helms*, 29 F.3d 367, 370 (8th Cir. 1994), *cert. denied*, 513 U.S. 1155, 115 S. Ct. 1111, 130 L. Ed. 2d 1076 (1995) ("We do not think that the district judge's having graduated from the university law school, even though the university is a party defendant, without more is a reasonable basis for questioning the judge's impartiality."); *Easley v. University of Michigan Board of Regents*, 906 F.2d 1143, 1146-47 (6th Cir. 1990), *cert. denied*, 499 U.S. 947, 111 S. Ct. 1424, 113 L. Ed. 2d 467 (1991) ("Without more, the amicable feelings [the district judge] undoubtedly has for his alma mater . . . fail to demonstrate a sufficient basis for his recusal"). Bernofsky has shown no jurisprudential authority to the contrary. Nor has he shown that Judge Berrigan's connection to Tulane is anything other than insubstantial. Under these facts, recusal is not warranted under 28 U.S.C. § 455(b)(5)(i).

CONCLUSION

In considering a writ of mandamus "the determination of the judge concerned should be afforded great weight, and should not be disturbed unless clearly erroneous." *Kinnear-Weed Corp. v. Humble Oil and Refining Co.*, 324 F. Supp. 1371, 1385 (S.D. Tex. 1969), *aff'd*, 441 F.2d 631 (5th Cir.) *cert. denied*, 404 U.S. 941, 92 S. Ct. 285, 30 L. Ed. 2d 255 (1971). Tulane respectfully suggests that Judge Berrigan did not abuse her sound judicial discretion in denying Bernofsky's motion to recuse her, and that the Fifth Circuit appropriately denied his writ of mandamus.

What is clear, here, is that Bernofsky has invoked an exceptional remedy for a decidedly partisan purpose. However, he has not satisfied his heightened burden of establishing entitlement to an issuance of a writ of mandamus, nor has he begun to demonstrate that Judge Berrigan abused her judicial discretion in denying his Motion to Recuse. Carl Bernofsky's Petition for Writ of Mandamus should be denied, and all costs of these proceedings should be borne by him.

Respectfully submitted,

G. PHILLIP SHULER, III
Counsel of Record
JULIE D. LIVAUDAIS
RICHARD B. RAMIREZ
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.
Attorneys for Respondent
1100 Poydras Street
2300 Energy Centre
New Orleans, LA 70163-2300
(504) 585-7000